

Designpartnership

11/1/01

Mr. Ron Votta
 Eastern Contractors Inc.
 571 Union Avenue
 Framingham, MA 01702

Re: New Wetherbee School

VIA FAX & MAIL

Dear Ron,

In response to your change order proposal #11 for the above referenced project. We agree that you are entitled to additional compensation for the additional subsurface condition encountered. However, with specific regard to the language included referencing MGL c30 s39N and your position that you are entitled to negotiate a revised unit cost for rock excavation. We respectfully disagree with your interpretation, and offer the following:

MGL 30:39N (included for reference) specifically notes that should actual subsurface or latent physical conditions substantially differ from those shown in the contract documents that the Contractor is entitled to an equitable contract adjustment. There is no language in 30:39N that mentions a contractors right to renegotiate a previously agreed to unit cost.

I believe that you are confusing the MGL language for Unit Price Contracts in which the language in this type of contract allows for the Contractor to renegotiate his unit price should the quantity of the work differ substantially from the estimated amount given at the time of bidding. As you are aware, in this type of contract the Contractor supplies the unit price in his bid, and therefore is bidding the project based on an assumed quantity. Obviously the unit price given by the contractor would vary based on the assumed quantity.

The issue at the Wetherbee School is completely different. To start, this is a lump sum contract not a unit price contract. The unit price was established in the contract documents by which a lump sum contract was signed. This unit price is therefore previously agreed to by both parties should conditions vary favorable to the Owner or the Contractor. This is a very fair way to enter into a contract so that both parties are in agreement prior to encountering the unanticipated subsurface conditions. Thereby adjusting the contract sum becomes a quick and painless process.

You also mentioned that allowances are prohibited by MGL. We agree. However we do not agree that the contract document for this item is written as an allowance since a specific quantity of material is provided in which you are to provide a price for. The contract documents do not tell the bidder to carry the mentioned unit price for the quantity of material to be bid on. The unit price is established for work above or below

Design Partnership of Cambridge, Inc.

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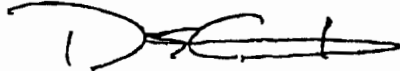
the given quantity. The bidder is fully able to provide a contract price based on the quantity given, higher or lower than if derived by using the unit price.

Due to all of the above, we cannot sign the Change Order Proposal as drafted. The reservation of your right to renegotiate the unit price must be removed. We are comfortable with the price given in the proposal and would like to get this issue resolved promptly in order to pay you for the work that has been completed.

Please revise and re-submit your proposal for my signature.

Sincerely,

DESIGN PARTNERSHIP of Cambridge Inc.

A handwritten signature in dark ink, appearing to read 'D. Capaldo', with a stylized flourish at the end.

David E. Capaldo, AIA

Associate

Cc: Joe Lupi - Tishman

30:39M. STATE DEPARTMENTS, ETC. — GENERAL PROVISIONS. [Chap. 30.]

that named or described in the said specifications may be furnished; and 55
 an item shall be considered equal to the item so named or described if (1) 56
 it is at least equal in quality, durability, appearance, strength and design, 57
 (2) it will perform at least equally the function imposed by the general 58
 design for the public work being contracted for or the material being 59
 purchased, and (3) it conforms substantially, even with deviations, to the 60
 detailed requirements for the item in the said specifications. For each 61
 item of material the specifications shall provide for either a minimum of 62
 three named brands of material or a description of material which can be 63
 met by a minimum of three manufacturers or producers, and for the 64
 equal of any one of said named or described materials. 65

(c) The term "lowest responsible and eligible bidder" shall mean the 66
 bidder (1) whose bid is the lowest of those bidders possessing the skill. 67
 ability and integrity necessary for the faithful performance of the work: 68
 (2) who shall certify that he is able to furnish labor that can work in 69
 harmony with all other elements of labor employed or to be employed in 70
 the work; (3) who, where the provisions of section eight B of chapter 71
 twenty-nine apply, shall have been determined to be qualified thereun- 72
 der; and (4) who obtains within ten days of the notification of contract 73
 award the security by bond required under section twenty-nine of 74
 chapter one hundred and forty-nine; provided that for the purposes of 75
 this section the term "security by bond" shall mean the bond of a surety 76
 company qualified to do business under the laws of the commonwealth 77
 and satisfactory to the awarding authority. 78

(d) The provisions of this section shall not apply (1) to the extent that 79
 they prevent the approval of such specifications by any contributing 80
 federal agency, (2) to materials purchased under specifications of the 81
 state department of highways at prices established by the said depart- 82
 ment pursuant to advertisement and bidding in connection with work to 83
 be performed under the provisions of chapter eighty-one or chapter 84
 ninety, (3) to any transaction between the commonwealth and any of its 85
 political subdivisions or between the commonwealth and any public 86
 service corporation, and (4) to any contract of not more than twenty-five 87
 thousand dollars awarded by a governmental body, as defined by section 88
 two of chapter thirty B, in accordance with the provisions of section five 89
 of said chapter thirty B. 90

(e) The word "material" as used in this section shall mean and 91
 include any article, assembly, system, or any component part thereof. 92

→ 30:39N. Construction contracts; equitable adjustment in contract price for differing subsurface or latent physical conditions.

Section 39N. Every contract subject to section forty-four A of chap- 1
 ter one hundred and forty-nine, or subject to section thirty-nine M of 2
 chapter thirty shall contain the following paragraph in its entirety and an 3
 awarding authority may adopt reasonable rules or regulations in con- 4

[Chap. 30.] STATE DEPARTMENTS, ETC. — GENERAL PROVISIONS. 30:390.

formity with that paragraph concerning the filing, investigation and
settlement of such claims: 5 6

If, during the progress of the work, the contractor or the awarding
authority discovers that the actual subsurface or latent physical condi- 7
tions encountered at the site differ substantially or materially from those 8
shown on the plans or indicated in the contract documents either the 9
contractor or the contracting authority may request an equitable adjust- 10
ment in the contract price of the contract applying to work affected by 11
the differing site conditions. A request for such an adjustment shall be 12
in writing and shall be delivered by the party making such claim to the 13
other party as soon as possible after such conditions are discovered. 14
Upon receipt of such a claim from a contractor, or upon its own initiative, 15
the contracting authority shall make an investigation of such physical 16
conditions, and, if they differ substantially or materially from those 17
shown on the plans or indicated in the contract documents or from those 18
ordinarily encountered and generally recognized as inherent in work of 19
the character provided for in the plans and contract documents and are 20
of such a nature as to cause an increase or decrease in the cost of 21
performance of the work or a change in the construction methods 22
required for the performance of the work which results in an increase or 23
decrease in the cost of the work, the contracting authority shall make an 24
equitable adjustment in the contract price and the contract shall be 25
modified in writing accordingly. 26 27

30:390. Contracts for construction and materials; suspension, delay or inter-
ruption due to order of awarding authority; adjustment in contract price:
required provisions.

Section 390. Every contract subject to the provisions of section 1
thirty-nine M of this chapter or subject to section forty-four A of chapter 2
one hundred forty-nine shall contain the following provisions (a) and (b) 3
in their entirety and, in the event a suspension, delay, interruption or 4
failure to act of the awarding authority increases the cost of performance 5
to any subcontractor, that subcontractor shall have the same rights 6
against the general contractor for payment for an increase in the cost of 7
his performance as provisions (a) and (b) give the general contractor 8
against the awarding authority, but nothing in provisions (a) and (b) shall 9
in any way change, modify or alter any other rights which the general 10
contractor or the subcontractor may have against each other. 11

(a) The awarding authority may order the general contractor in 12
writing to suspend, delay, or interrupt all or any part of the work for 13
such period of time as it may determine to be appropriate for the 14
convenience of the awarding authority; provided however, that if there is 15
a suspension, delay or interruption for fifteen days or more or due to a 16
failure of the awarding authority to act within the time specified in this 17
contract, the awarding authority shall make an adjustment in the con- 18